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No.

In the Supreme Court of the United States

LORETTA E. LYNCH, ATTORNEY GENERAL, PETITIONER

v.

LUIS RAMON MORALES-SANTANA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

In order for a United States citizen who has a child abroad with a non-U.S. citizen to transmit his or her citizenship to the foreign-born child, the U.S.-citizen parent must have been physically present in the United States for a particular period of time prior to the child's birth. The questions presented are:

1. Whether Congress's decision to impose a different physical-presence requirement on unwed citizen mothers of foreign-born children than on other citizen parents of foreign-born children through 8 U.S.C. 1401 and 1409 (1958) violates the Fifth Amendment's guarantee of equal protection.

2. Whether the court of appeals erred in conferring U.S. citizenship on respondent, in the absence of any express statutory authority to do so.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 3a-41a) is reported at 804 F.3d 520. The decisions of the Board of Immigration Appeals (App., *infra*, 42a-44a) and of the immigration judge (App., *infra*, 45a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 8, 2015, and amended on October 30, 2015. A petition for rehearing was denied on December 1, 2015 (App., *infra*, 1a-2a). On February 16, 2016, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March

30, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are reproduced in the appendix to this petition. App., *infra*, 50a-54a.

STATEMENT

1. This case involves the constitutionality of the statutory provisions governing when a child born abroad out of wedlock is granted U.S. citizenship at birth. Article I of the United States Constitution assigns to Congress the "Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. Pursuant to that authority, Congress has conferred U.S. citizenship at birth on certain persons born outside of the United States or its outlying possessions through various provisions in the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.* The rules Congress enacted are designed to assure that persons who are granted U.S. citizenship have, through their legally recognized U.S.-citizen parents, what Congress determined to be a sufficient connection to the United States to warrant conferral of U.S. citizenship at birth.

At the time of respondent's birth in 1962, App., *infra*, 6a, a child born outside the United States to married parents, both of whom were U.S. citizens, was declared by the INA to be a U.S. citizen if one of his parents had a residence in the United States of any duration prior to the child's birth. 8 U.S.C.

1401(a)(3).[1] The rule was different if only one of the child's married parents was a U.S. citizen. In that situation, there was only one legally recognized parent through whom the child could establish the requisite connection to the United States, and there was, moreover, a competing claim of connection to another country—the country of which the child's other parent was a citizen. The 1952 version of the INA accordingly provided that when a child was born abroad to married parents only one of whom was a U.S. citizen, the child was declared to be a U.S. citizen only if, before the child's birth, the U.S.-citizen parent had been physically present in the United States for a total of ten years, at least five of which were after the parent had turned 14 years of age. 8 U.S.C. 1401(a)(7).[2]

While 8 U.S.C. 1401 governed the granting of U.S. citizenship to children born abroad to married parents, 8 U.S.C. 1409 governed the granting of citizenship to children born abroad out of wedlock. Section

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[1] Unless otherwise noted, all references in the text to 8 U.S.C. 1401 and 1409 are to the 1958 edition of the United States Code, the version of the relevant naturalization provisions of the INA in effect when respondent was born. Section 1401 has since been amended. Immigration and Nationality Act Amendments of 1986 (1986 Act), Pub. L. No. 99-653, § 12, 100 Stat. 3657. Those amendments do not apply unless the child was born on or after November 14, 1986, however, and thus do not govern respondent's citizenship claim. See Immigration Technical Corrections Act of 1988, Pub. L. No. 100-525, § 8(r), 102 Stat. 2619.

[2] In the 1986 amendments, Congress reduced the term of the required physical presence in the United States to a total of five years, two of which must be after the parent turned 14. 1986 Act § 12, 100 Stat. 3657, redesignated as 8 U.S.C. 1401(g). As pointed out in note 1, *supra*, that amendment applies only to children born after the effective date of those amendments.

1409(a) stated a general rule that specified provisions of Section 1401(a)—including paragraphs (a)(3) and (7), discussed above—shall apply to a child born out of wedlock on or after the effective date of the 1952 Act if the paternity of the child was established "by legitimation" while the child was under age 21. 8 U.S.C. 1409(a). In other words, Section 1409(a) provided that if the child was legitimated before he reached 21, he was declared to be a U.S. citizen as of the date of his birth subject to the same conditions as if his parents had been married at the time of his birth. Thus, if both parents were U.S. citizens, even though unmarried at the time of the child's birth, it was sufficient that one of the parents had a residence in the United States of any duration prior to the child's birth. But if only one of the two parents was a U.S. citizen, that parent must have been physically present in the United States for a period totaling at least ten years, at least five of which were after attaining the age of 14, for the child to be a U.S. citizen pursuant to Section 1409(a). *Nguyen* v. *INS*, 533 U.S. 53, 59-73 (2001) (discussing current version of Section 1409(a), requiring, *inter alia*, that paternity be established while the child was under age 18).[3]

Section 1409(c) created an additional basis for the granting of citizenship to a child born out of wedlock abroad. It provided that, notwithstanding 8 U.S.C. 1409(a), such a child shall be a U.S. citizen if the mother was a U.S. citizen and the mother had previ-

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[3] Section 1409(a) was amended in 1986 to revise the requirements that must be satisfied for a child born abroad out of wedlock to obtain citizenship through a U.S.-citizen father. 1986 Act § 13(b), 100 Stat. 3657; *Miller* v. *Albright*, 523 U.S. 420, 468 (1998) (Ginsburg, J., dissenting).

ously been physically present in the United States for a continuous period of one year. 8 U.S.C. 1409(c). That rule reflected the reality that when a child is born out of wedlock, there ordinarily is only one legally recognized parent—the mother—at the time of birth. Where the mother was a U.S. citizen, Congress determined that the mother's one year of continuous physical presence in the United States prior to the child's birth abroad was sufficient to create the requisite connection to the United States.

Section 1409(c) also addressed the situation that would arise if the alien father later legitimated a child who had been granted U.S. citizenship at birth based on his mother's one year of continuous presence in the United States prior to his birth. If the ten- and five-year physical-presence requirements in Section 1401(a)(7) were applicable through Section 1409(a) in that situation—because there were two parents, only one of whom was a U.S. citizen—the child would have been *divested* of the U.S. citizenship he had obtained at birth unless the mother also satisfied the ten- and five-year physical-presence requirements in Section 1401(a)(7). Section 1409(c) made clear that such a divestment would not occur by providing that such a child was a U.S. citizen at birth "[n]otwithstanding the provision of subsection (a)"—*i.e.*, notwithstanding the legitimation of the child by the father before the child reached age 21. 8 U.S.C. 1409(c).

2. a. In 1962, respondent was born in the Dominican Republic to unmarried parents. App., *infra*, 6a. Respondent's mother was a citizen of the Dominican Republic. *Ibid.* At the time of respondent's birth, his father was a U.S. citizen who had not spent more than five years in the United States or a U.S. possession

after his 14th birthday. *Ibid.* Respondent's father legitimated respondent when he married respondent's mother in 1970, before respondent turned age 21. *Ibid.* Respondent was admitted to the United States as a lawful permanent resident in 1975. *Ibid.* Respondent's father died in 1976. *Ibid.*

In 1995, respondent was convicted of burglary in the first degree, two counts of robbery in the second degree, four counts of attempted murder, and criminal possession of a weapon in the second degree. App., *infra*, 46a. In 2000, respondent was placed in removal proceedings, where he admitted that he was removable as an alien who had committed aggravated felonies and a firearms offense. *Id.* at 45a-46a. The immigration judge denied his applications for asylum and protection from removal and ordered him removed from the United States. *Id.* at 47a-49a. Respondent filed motions for reconsideration and to reopen, see *id.* at 42a (noting that respondent's motion was "number-barred"), claiming for the first time in the final such motion that he was a U.S. citizen by virtue of his father's U.S. citizenship. *Id.* at 8a, 42a-44a. The Board of Immigration Appeals (BIA) denied that motion in 2011 on the ground that his father had not satisfied the physical-presence requirement in 8 U.S.C. 1401(a)(7). App., *infra*, 42a-44a.

b. Respondent petitioned for review of the BIA's decision in the United States Court of Appeals for the Second Circuit. The court of appeals first considered and rejected respondent's statutory arguments that he was a U.S. citizen from birth under 8 U.S.C. 1401. App., *infra*, 8a-14a. The court went on, however, to hold that the statutory scheme governing whether a child who was born abroad out of wedlock to one U.S.-

citizen parent and one alien parent was a U.S. citizen at birth violates the equal protection rights of respondent's U.S.-citizen father. *Id.* at 14a-41a.

Applying intermediate scrutiny, App., *infra*, 16a-20a, the court agreed with the government that its two asserted interests—ensuring a sufficient connection between a child born abroad and the United States, and avoiding statelessness—are important government interests, *id.* at 21a-26a. But the court concluded that neither interest was advanced by the challenged statutory scheme. *Id.* at 21a-34a. The court held that, although the government's interest in ensuring that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship justifies imposing a physical-presence requirement on such a child's parent or parents, it does not justify imposing a different physical-presence requirement when a child's unwed mother is a U.S. citizen. *Id.* at 21a-25a. The court also rejected the government's argument that Congress opted to impose a different physical-presence requirement on unwed U.S.-citizen mothers in order to reduce statelessness. *Id.* at 25a-32a. The court further held that, even if that had been Congress's purpose, its pursuit of that goal failed to satisfy intermediate scrutiny because, in the court's view, gender-neutral means of serving that interest were available. *Id.* at 32a-34a. The court acknowledged that its ruling conflicts with the Ninth Circuit's decision in *United States* v. *Flores-Villar*, 536 F.3d 990, 997 (2008), aff'd by an equally divided Court, 564 U.S. 210 (2011) (per curiam). App., *infra*, 22a, 34a n.17.

As a remedy for the equal protection violation it found, the court of appeals declared that respondent

"is a citizen [of the United States] as of his birth." App., *infra*, 41a. The court relied on the INA's severability provision to extend what it viewed as the "less onerous" one-year continuous-physical-presence requirement to unwed U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers), *id.* at 36a, rejecting the government's argument that the proper remedy would be to extend to unmarried U.S.-citizen mothers the ten- and five-year physical-presence requirements that otherwise apply when a child is born abroad and only one parent is a U.S. citizen, *id.* at 35a-41a.

REASONS FOR GRANTING THE PETITION

The Second Circuit erroneously declared an important provision of an Act of Congress to be unconstitutional in a decision that creates an acknowledged circuit conflict. The court of appeals further erred when it remedied the perceived constitutional violation by granting citizenship to respondent without constitutional or statutory authority to do so. Review by this Court is warranted to correct the court of appeals' errors and to reinstate the uniform national rules Congress enacted for the acquisition of U.S. citizenship by children born abroad out of wedlock to parents only one of whom was a U.S. citizen at the time of the child's birth. This Court previously granted a petition for a writ of certiorari presenting the same questions, even in the absence of a circuit split, and in a case in which the constitutionality of the Act of Congress had been upheld by the court of appeals. *Flores-Villar* v. *United States*, 564 U.S. 210 (2011) (per curiam) (affirming by an equally divided Court). A fortiori, review is warranted here.

A. The Court Of Appeals Erred In Holding That The Challenged Statutory Provisions Violate The Equal Protection Component Of The Fifth Amendment's Due Process Clause

In considering respondent's constitutional challenge to the statutes that govern the granting of U.S. citizenship to a child born abroad to one U.S.-citizen parent and one alien parent, the court of appeals applied the wrong level of scrutiny, discounted important government interests, and erroneously concluded that the distinctions in the challenged scheme are based on congressional stereotypes about gender roles. Review by this Court is warranted to correct the court of appeals' erroneous holding that the difference in physical-presence requirements in Sections 1401 and 1409 are unconstitutional.

1. The court of appeals erred in refusing to apply rational-basis review when considering respondent's constitutional challenge. As this Court has long held, the Fourteenth Amendment to the Constitution "contemplates two sources of citizenship, and two only: birth and naturalization." *United States* v. *Wong Kim Ark*, 169 U.S. 649, 702 (1898). Although "[e]very person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, * * * [a] person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty * * * or by authority of Congress." *Id.* at 702-703. There is no dispute in this case that respondent was born outside the United States and is therefore not entitled—as a constitutional matter—to citizenship by virtue of his birth. Instead, he asserts a right to the "acquisition of citizenship by being born abroad of an American par-

ent," which is "obviously" not governed by the Fourteenth Amendment. *Rogers* v. *Bellei*, 401 U.S. 815, 830 (1971) (quoting *Wong Kim Ark*, 169 U.S. at 688).

Article I of the Constitution vests in Congress the authority "To establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8, Cl. 4; see *Wong Kim Ark*, 169 U.S. at 688. Authority over naturalization is thus "vested exclusively in Congress" by the Constitution. *Wong Kim Ark*, 169 U.S. at 701. That authority encompasses both the power to grant citizenship to children who are born abroad of U.S.-citizen parents *and* the power not to do so. With respect to citizenship through naturalization, respondent is bound by the rules established by Congress. See *Bellei*, 401 U.S. at 828 (noting that "naturalization by descent" is "dependent * * * upon statutory enactment").

Decisions about what classes of persons are eligible for statutory citizenship are quintessentially legislative determinations. The Naturalization Clause reflects the fundamental proposition, inherent in sovereignty, that "[e]very society possesses the undoubted right to determine who shall compose its members." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 707 (1893) (citation omitted). The power to confer or deny citizenship on individuals born abroad—individuals who are "alien[s] as far as the Constitution is concerned"—is also an aspect of the power to exclude aliens from the Nation. *Miller* v. *Albright*, 523 U.S. 420, 453 (1998) (Scalia, J., concurring in the judgment). And the United States' "policy toward aliens" is "vitally and intricately interwoven with * * * the conduct of foreign relations," a power that likewise is vested in the political Branches. *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

Although the Judiciary has a crucial role in protecting rights accorded under the Constitution to persons who have been granted citizenship by the Fourteenth Amendment or by Congress, and to those aliens who are in the United States, "[c]ourts have long recognized the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control." *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 210 (1953); see *Kleindienst* v. *Mandel*, 408 U.S. 753, 766-767 (1972); *United States* v. *Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318 (1936).

As this Court explained in *Plyler* v. *Doe*, 457 U.S. 202 (1982), "Congress has developed a complex scheme governing admission to our Nation and status within our borders. * * * The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field." *Id.* at 225. That principle of deference to Congress's "broad power over immigration and naturalization" "has become about as firmly embedded in the legislative and judicial tissues of our body politic as any aspect of our government." *Fiallo* v. *Bell*, 430 U.S. 787, 792, 793 n.4 (1977) (quoting *Galvan* v. *Press*, 347 U.S. 522, 531 (1954)). Accordingly, Congress's judgments regarding the requirements that must be satisfied in order for a child born abroad to acquire his parent's U.S. citizenship are entitled to great deference and should be upheld if the reviewing court can discern "a facially legitimate and bona fide reason" for those judgments. *Id.* at 794 (citation omitted).

The court of appeals erred in declining to adhere to the principle, reaffirmed most authoritatively in *Fiallo*, that courts accord deference to congressional

action in this area. The court of appeals declined to follow *Fiallo* because that case concerned "Congress's 'exceptionally broad power' to admit or remove non-citizens." App., *infra*, 17a (quoting *Fiallo*, 430 U.S. at 794). But the power to grant citizenship (or not) to individuals born abroad is just as subject to the plenary authority of Congress as the power to admit or exclude aliens; indeed, it is an aspect of the same power. In any event, the plaintiffs in *Fiallo* included U.S. citizens, 430 U.S. at 790 n.3, who unsuccessfully argued that rational-basis review should not apply because the statutory provision at issue implicated "constitutional interests of United States citizens and permanent residents." *Id.* at 794 (citation omitted). If rational-basis review applied to the constitutional claims of citizens in *Fiallo*, it should apply to respondent's constitutional claim as well.[4]

2. The court of appeals also erred in holding that the statutory scheme could not pass constitutional muster under intermediate scrutiny. The physical-presence requirements set forth in Sections 1401 and 1409 do not violate equal protection because they are substantially related to important government interests.

a. The court of appeals correctly acknowledged that Congress has an important interest in ensuring

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[4] The court of appeals also justified its application of heightened scrutiny by contending that seven Justices in *Miller* v. *Albright*, *supra*, would have applied heightened scrutiny to review a similar gender-based equal protection challenge to a related provision of the INA. App., *infra*, 18a-19a. That reasoning is flawed, however, because this Court expressly stated in its later decision in *Nguyen* v. *INS*, 533 U.S. 53, 61 (2001), that it was *not* deciding whether heightened scrutiny should apply to such a challenge in the immigration and naturalization context.

that foreign-born children of parents of different nationalities have a sufficient connection to the United States, through their U.S.-citizen parent, to warrant U.S. citizenship at birth. App., *infra*, 21a. This Court in *Nguyen* v. *INS*, 533 U.S. 53 (2001), recognized that Congress has a legitimate "desire to ensure some tie between this country and one who seeks citizenship." *Id.* at 68. The court of appeals dismissed that interest, however, because it believed that "unwed mothers and fathers are similarly situated with respect to how long they should be present in the United States or an outlying possession prior to [a] child's birth in order to have assimilated citizenship-related values to transmit to the child." App., *infra*, 24a (emphases omitted). The court of appeals was mistaken.

The imposition of a physical-presence or residence requirement on *all* U.S.-citizen parents of children born abroad serves Congress's interest in ensuring a sufficient connection between those children and the United States.[5] The different presence requirements reflect the differing circumstances that Congress concluded required different measures for determining whether the child's legal ties to the United States were sufficiently strong to warrant a grant of U.S. citizenship—depending on whether there was one legally recognized parent or two, and whether, if two,

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[5] At the time of respondent's birth in 1962, a child born outside the United States to married parents, both of whom were U.S. citizens, could acquire citizenship through either of his U.S.-citizen parents if, before the child's birth, one of the parents "had a residence in the United States or one of its outlying possessions." 8 U.S.C. 1401(a)(3). Section 1401 has since been amended, with former Section 1401(a)(3) redesignated as Section 1401(c). Act of Oct. 10, 1978, Pub. L. No. 95-432, § 3, 92 Stat. 1046.

one of them was an alien who would owe allegiance to another country. For example, where both legally recognized parents were U.S. citizens, the child's legal ties to the United States were especially strong and there was likely no competing claim of a legal connection to another country. In that situation, whether the parents were married at the time of the child's birth or the parents were unmarried but the father later legitimated the child, Congress required only that one of the two U.S.-citizen parents have had a residence in the United States at some point prior to the child's birth. See 8 U.S.C. 1401(a)(3), 1409(a).[6]

By contrast, at the time of respondent's birth, when there were two legally recognized parents but only one was a U.S. citizen, the general rule was that the U.S.-citizen parent (married or unmarried) had to satisfy a physical-presence requirement of ten years (in the aggregate) prior to the birth of the child, at least five of which had to be after the parent was 14 years old. Section 1409(c), however, adopted a different physical-presence requirement (one year of continuous physical presence) when the mother was a U.S. citizen and unwed. When a child was born out of wedlock, the mother typically was the only legally recognized parent at the time of birth. There accordingly was no competing claim of a connection to another country through a legally recognized alien parent. In that situation, Congress concluded that the

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[6] Indeed, that rule was more lenient than the rule applicable under 8 U.S.C. 1409(c) at the time of the child's birth if the mother (who would typically have been the only legally recognized parent) was a U.S. citizen. Under Section 1409(c), the new-born child was granted citizenship only if the mother had been continuously present in the United States for one year.

requirement of one year of continuous physical presence for the mother created a sufficient connection between the United States and the child to warrant the conferral of citizenship on the child at birth. Section 1409(c) also made explicit that a child granted U.S. citizenship at birth would not be divested of that citizenship in the event that the alien father later legitimated the child at some point over the ensuing 21 years: It provided that the conferral of citizenship shall apply "[n]otwithstanding" the general rule of the ten- and five-year physical-presence requirements under Sections 1409(a) and 1401(a)(7) when, following legitimation of the child by an alien father, there were two legally recognized parents.

Respondent's circumstances present the reverse situation. When he was born out of wedlock in the Dominican Republic, his mother—his only legally recognized parent—was *not* a U.S. citizen, and respondent therefore had no legally recognized connection to the United States *at all*. At the time of his birth (*i.e.*, before legitimation by the marriage of his parents), respondent therefore had no claim of U.S. citizenship. When respondent's U.S.-citizen father later legitimated respondent by marrying respondent's mother, respondent then had two legal parents, one of whom remained an alien. The general rule in Sections 1409(a) and 1401(a)(7) for the two-parent situation therefore applied. Respondent's father thus was not similarly situated to a U.S.-citizen mother of a child born out of wedlock abroad, either when respondent was born or when his father later married his mother. A U.S.-citizen mother, at the time of her child's birth, would have been a legally recognized parent and the only such parent, and there according-

ly would have been no competing claim of a connection to a foreign country. By contrast, when respondent was born, he had no legal relationship to the U.S.-citizen father who later legitimated him, and therefore no legal relationship to the United States; and when his father *did* later legitimate him and thereby established a legal relationship with him for the first time, there were then *two* legal parents, each with a different nationality. It was entirely reasonable for Congress to conclude that in that situation, assurance of a sufficient connection to the United States called for application of the general rule requiring ten- and five-years of physical presence in the United States by the U.S.-citizen parent that is applicable even to mixed-nationality *married* couples.

Because the U.S.-citizen mother and father—and their children—were therefore not similarly situated, the separate provision in Section 1409(c) for granting citizenship to the child of a U.S.-citizen mother who had been physically present in the United States for a continuous period of one year prior to the child's birth does not violate equal protection, even under intermediate scrutiny. And preserving the U.S. citizenship of the child born abroad to the unwed U.S.-citizen mother, once granted at birth, even if the child was later legitimated by his alien father, plainly advances a substantial governmental interest and fully justifies the differing physical-presence requirements. See *Heckler* v. *Mathews*, 465 U.S. 728, 745-750 (1984).

b. The statutory provisions also serve a second important interest, *viz.* reducing the risk that a child would be stateless at birth.[7] Although the court of

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[7] The physical-presence requirements applicable to respondent's case were adopted in 1952. Between Congress's overhaul of na-

appeals acknowledged that reducing the risk of statelessness at birth is an important government interest, it cited three bases—all erroneous—on which to conclude that such an interest does not justify the statutory scheme Congress enacted. App., *infra*, 25a-34a.

First, the court erred in rejecting the government's contention that Congress's decision to impose a shorter (but continuous) physical-presence requirement on unmarried U.S.-citizen mothers was in fact motivated by a desire to reduce the risk of statelessness. App., *infra*, 26a-32a. The Senate Report on the 1952 version of the INA addressed the provisions that prescribe who qualifies as a U.S. citizen at birth. S. Rep. No. 1137, 82d Cong., 2d Sess. 38-39 (1952) (Senate Report). The Report noted that the 1952 revisions to the then-existing nationality laws were not as extensive as the 1940 revisions that adopted the then-existing naturalization laws, see Nationality Act of 1940 (1940 Act), ch. 876, 54 Stat. 1137—but noted that "new conditions brought on by World War II and the postwar era have required a reappraisal and a

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tionality laws in 1940 and its adoption of the INA in 1952, children born abroad to an unmarried U.S.-citizen mother and an alien father acquired the nationality of the mother if the mother had ever resided in the United States for *any* period, unless the father legitimated before the age of majority. Nationality Act of 1940, ch. 876, Tit. I, ch. II, § 205, 54 Stat. 1139-1140. By imposing a one-year continuous-physical-presence requirement on unmarried mothers for the first time in 1952, INA, ch. 477, Tit. III, ch.1, § 309(c), 66 Stat. 239, Congress advanced its interest in ensuring a substantial connection between a foreign-born child and the United States.

rewriting of the nationality laws of the United States." Senate Report 38.[8]

One of the revisions Congress enacted in 1952 was to make explicit that the conferral of citizenship based on the U.S.-citizen mother's physical presence in the United States—which Congress revised to require one year of continuous physical presence rather than merely a physical presence of any duration—would not be abrogated if the child were later legitimated by the alien father and if the U.S.-citizen mother did not satisfy the ten- and five-year physical-presence requirements applicable under Section 1409(a) when there were two legal parents. The text of the parallel provision of the 1940 Act could have been read to require abrogation of the child's U.S. citizenship in those circumstances,[9] although the BIA interpreted

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[8] Congress and the world became acutely aware of the problem of statelessness in the years during and following the First and Second World Wars. See, *e.g.*, United Nations, *A Study of Statelessness* 4-7 (1949); http://www.unhcr.org/3ae68c2d0.pdf; Hugh Massey, *UNHCR and* De Facto *Statelessness* 1-26 (2010), http://www.unhcr.org/4bc2ddeb9.pdf.

[9] Section 205 of the 1940 Act specified that Section 201(g)—which provided that a person born abroad to one U.S.-citizen parent and one alien parent would be a U.S. citizen from birth if his U.S.-citizen parent had resided in the United States for ten years prior to the child's birth, § 201(g), 54 Stat. 1139—would "apply, as of the date of birth, to a child born out of wedlock, provided the paternity is established during minority, by legitimation, or adjudication of a competent court." § 205, 54 Stat. 1139. Section 205 went on to provide that, "*[i]n the absence of such legitimation or adjudication*, the child, * * * if the mother had the nationality of the United States at the time of the child's birth, and had previously resided in the United States or one of its outlying possessions, shall be held to have acquired at birth her nationality status." 54 Stat. 1140 (emphasis added).

that provision to preserve the child's citizenship in a decision shortly before the 1952 Act was passed. *Matter of M—*, 4 I. & N. Dec. 440, 442-445 (1951). The enactment of Section 1409(c) removed any ambiguity on that point. In explaining the purpose of that provision, the Senate Report directly addressed the issue of statelessness, stating: "This provision establishing the child's nationality as that of the [U.S.-citizen] mother regardless of legitimation or establishment of paternity is new. *It insures that the child shall have a nationality at birth.*" Senate Report 39 (emphasis added).

The court of appeals dismissed that clear statement of congressional purpose, stating: "Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue." App., *infra*, 29a n.10. The court of appeals' reasoning is misguided. The Senate Report directly links the rule applicable to unmarried U.S.-citizen mothers of children born abroad to the purpose that such children "shall have a nationality at birth." Senate Report 39. If the 1952 Senate had anticipated this litigation, perhaps it would have been more expansive in its explanation of that connection—but its meaning is nevertheless clear. Congress imposed and preserved the shorter (but continuous) physical-presence requirement for unmarried U.S.-citizen mothers to "insure[]" that the children would have a nationality at birth and not be divested of it upon later legitimation by the father. *Ibid.*[10]

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[10] The congressional hearings leading to the 1940 overhaul of the nationality laws also included a survey of the citizenship laws of other nations; that survey revealed that in approximately 30

Second, the court of appeals erred in speculating that the physical-presence requirements "arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock," because the court was not persuaded "that the children of unwed citizen mothers faced a greater risk of statelessness than the children of unwed citizen fathers." App., *infra*, 30a-31a. That rationale ignores the fact that the child born out of wedlock of a U.S.-citizen father and the child born out of wedlock of a U.S.-citizen mother were not similarly situated as a legal matter either at the time of birth or at the time of legitimation, for the reasons given above. See pp. 13-16, *supra*. But in any event, the risk of statelessness at the time of birth was greater for children born abroad to an unwed U.S.-citizen mother than for those born to an unwed U.S.-citizen father because at the time Congress enacted a comprehensive naturalization code in 1940 (and substantially revised it in 1952), the laws of many *other* countries would not extend citizenship to such a child born in that country.

Unlike the United States, which affords citizenship on a "*jus soli*" basis to all who are born in the United States and subject to its jurisdiction, many other countries apply "*jus sanguinis*" rules, pursuant to

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nations, a child born out of wedlock acquired the citizenship of the mother (subject, in most but not all cases, to taking the citizenship of the father in the event of legitimation). *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (1945); see Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258-259 (1935).

which a child's citizenship is determined at birth through his blood relationship to a parent rather than with reference to his place of birth. See *Miller*, 523 U.S. at 477 (Breyer, J., dissenting). The potential for statelessness arises when a child is born in a *jus sanguinis* country but is unable to obtain the nationality of either of his parents. In most of those countries (as in most *jus soli* countries), when a child was born to an unwed mother, the only parent legally recognized as the child's parent at the time of the birth usually was the mother. See Durward V. Sandifer, *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248, 258 & n.38 (1935) (cited in *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearings Before the House Comm. on Immigration and Naturalization*, 76th Cong., 1st Sess. 431 (1945)). Although the child's father could subsequently obtain the status of a legal parent through legitimation (typically through marriage) or perhaps through other formal means, the establishment of such a relationship did not occur as a result of the birth alone. Thus, when a child was born out of wedlock, the only parent on whom a child's citizenship *at the time of birth* could be based in a *jus sanguinis* country was the mother. That state of affairs created a substantial risk that a child born to an unwed U.S.-citizen mother in a country employing *jus sanguinis* rules of citizenship would be stateless at birth unless the child could obtain the citizenship of the mother. The same risk was not present for the child of an unwed U.S.-citizen father in a *jus sanguinis* country that would allow the child to take the

citizenship of his mother, the only legally recognized parent at the time of the child's birth.

The differential treatment embodied in the physical-presence requirements, in addition to reflecting the difference in relative connections of the child to the United States through a legally recognized parent, thus also reflects the reality that, by operation of the law of many other countries, many children born abroad to an unwed U.S.-citizen mother could have had no nationality at birth. The statutory scheme does not "reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock," as the court of appeals concluded. App., *infra*, 30a-31a. It turned on legal rules establishing the legal status of parent and child, both abroad and in this country. Congress cannot be expected to ignore established foreign laws governing the legal status of a child's parents at birth. The Constitution's guarantee of equal protection does not require that Congress treat men and women the same in a particular context in which they are not similarly situated. See, *e.g.*, *Schlesinger* v. *Ballard*, 419 U.S. 498, 508 (1975). And this Court has already held, in particular, that unwed U.S.-citizen mothers and unwed U.S.-citizen fathers are not similarly situated in every respect, as regards their legal relationship to a child born out of wedlock. See *Nguyen*, 533 U.S. at 63; see also *Lehr* v. *Robertson*, 463 U.S. 248, 266-268 (1983); *Parham* v. *Hughes*, 441 U.S. 347, 355 (1979) (opinion of Stewart, J.). The difference in each parent's situation under Section 1409(a) and (c) is attributable to what this Court in *Nguyen* described as the "significant difference between the[] respective relationships" of unwed mothers and unwed fathers

"to the potential citizen at the time of birth," 533 U.S. at 62, not to impermissible stereotypes.

Third, the court of appeals erred in concluding that the government's important interest in reducing statelessness was not sufficient to justify the scheme because, it reasoned, "effective gender-neutral alternatives" were available at the time of the statute's enactment. App., *infra*, 32a. The court based that assertion exclusively on a 1933 proposal by then-Secretary of State Cordell Hull that would have amended the nationality laws to provide:

> A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

Id. at 33a (quoting Letter from Cordell Hull, Secretary of State, to Samuel Dickstein, Chairman, Comm. on Immigration & Naturalization (Mar. 27, 1933), *reprinted in Relating to Naturalization and Citizenship Status of Children Whose Mothers Are Citizens of the United States, and Relating to the Removal of Certain Inequalities in Matters of Nationality: Hearings Before the House Comm. On Immigration and Naturalization*, 73d Cong., 1st Sess. 8-9 (1933) (1933 Hearing)). The court of appeals erred in relying on Secretary Hull's proposed amendment because the amendment, while gender-neutral on its face, would have applied in the same gender-specific manner that the challenged law does. As discussed, Congress was concerned that the only circumstance in which a child would be born abroad to an unwed U.S.-citizen parent

who was the *only* legal parent at the time of the child's birth was when the child's unwed *mother* was a U.S. citizen. That was clear to observers at the time. See 1933 Hearing 56 (noting that "[w]hile the State Department has made this to read as though [the Hull proposal] were equal as to men and women, I think they have an idea that it would just apply to women").

For purposes of assessing respondent's equal protection challenge, the salient fact is how the challenged law *operates*, not the words that it uses. As this Court explained in *Nguyen*:

> The issue is not the use of gender specific terms instead of neutral ones. Just as neutral terms can mask discrimination that is unlawful, gender specific terms can mark a permissible distinction. The equal protection question is whether the distinction is lawful. Here, the use of gender specific terms takes into account a biological difference [and in this case, a legal difference] between the parents. The differential treatment is inherent in a sensible statutory scheme, given the unique relationship of the mother to the event of birth.

533 U.S. at 64; see *ibid.* ("[T]o require Congress to speak without reference to the gender of the parent with regard to its objective of ensuring a blood tie between parent and child would be to insist on a hollow neutrality."). The court of appeals' reliance on Secretary Hull's proposed amendment was therefore error.

In any event, as explained above, the distinctions in and between Sections 1401(a)(7) and 1409 are independently supported by the substantial governmental interest in assuring a sufficient connection to the

United States of children who are not similarly situated.

B. The Court Of Appeals Exceeded Its Constitutional And Statutory Authority By Extending U.S. Citizenship To Respondent

This Court's review is also warranted because the court of appeals exceeded its constitutional and statutory authority by declaring respondent to be a U.S. citizen.

This Court has noted that, when a court sustains an equal protection claim, it "faces 'two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion.'" *Mathews*, 465 U.S. at 738 (citation omitted; brackets in original). This general rule rests on the premise that the appropriate solution to the abridgment of the Constitution's equal protection guarantee is to bring about equal treatment, "a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Id.* at 740; see *Miller*, 523 U.S. at 458 (Scalia, J., concurring in the judgment) ("The constitutional vice consists of unequal treatment, which may as logically be attributed to the disparately generous provision (here, supposedly, the provision governing citizenship of illegitimate children of citizen-mothers) as to the disparately parsimonious one (the provision governing citizenship of illegitimate children of citizen-fathers)."). The court of appeals chose to remedy the equal protection violation it perceived by "replacing the ten-year physical presence requirement in § 1401(a)(7) (and incor-

porated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c)." App., *infra*, 40a. In other words, the court extended what it viewed as the more favorable treatment (the one-year continuous-physical-presence requirement) to unmarried U.S.-citizen fathers (but not to married U.S.-citizen mothers or fathers).[11] The court of appeals erred in choosing that remedy because it flouts congressional intent and exceeds the court's authority with respect to naturalization.

1. The court of appeals' choice of remedy—imposed more than 60 years after Section 1409(c) was enacted, 50 years after respondent was born, and 40 years after his father legitimated him—would have the effect of granting U.S. citizenship (from birth) to an untold number of individuals who did not satisfy the statutory criteria set by Congress and who grew up with no expectation that they were citizens of the United States.[12] That result is inconsistent with this

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[11] The court of appeals thus purported to rewrite Section 1401(a)(7), as applied to unmarried parents through Section 1409(a), to provide that the following shall be nationals and citizens of the United States at birth:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a *continuous period of one year*.

App., *infra*, 40a n.19.

[12] The court of appeals also failed to grasp that its approach to a remedy could make it *harder* for some unwed U.S.-citizen fathers to satisfy the conditions necessary to make their children (who are born abroad) U.S. citizens at birth under Section 1409. The court of appeals focused exclusively on the difference in *length* between

Court's cases holding that "the power to make someone a citizen of the United States has not been conferred upon the federal courts * * * as one of their generally applicable equitable powers." *INS* v. *Pangilinan*, 486 U.S. 875, 883-884 (1988); see *United States* v. *Ginsberg*, 243 U.S. 472, 474 (1917) ("An alien who seeks political rights as a member of this Nation can rightfully obtain them only upon terms and conditions specified by Congress. Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect of a matter so vital to the public welfare."). Indeed, this Court acknowledged in *Nguyen* that "[t]here may well be potential problems with fashioning a remedy" if the Court were to find that the additional requirements applicable to unwed citizen fathers under Section 1409(a) violated equal protection. 533 U.S. at 72 (quoting *Miller*, 523 U.S. at 451 (O'Connor, J., concurring in the judgment)) (internal quotation marks omitted); accord *Miller*, 523 U.S. at 453 (Scalia, J., concurring in the judgment) ("[T]he Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress.").[13]

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the ten- and five-year physical-presence requirements in 8 U.S.C. 1409(a) and the one-year continuous-physical-presence requirement in Section 1409(c), without acknowledging that the relevant ten and five years need not be continuous. For example, some unwed citizen fathers who lived in border regions between the United States and Mexico or Canada and who traveled back and forth, might have been able to satisfy the ten- and five-year physical-presence requirements but not the one-year *continuous*-physical-presence requirement.

[13] The INA itself reflects courts' constrained authority to naturalize individuals who do not meet the statutory criteria established by Congress. In 8 U.S.C. 1421(d), Congress has specified

2. The court of appeals also erred insofar as it believed the remedy it imposed was consistent with congressional intent. The court noted that, before 1940, Congress had allowed the foreign-born children of U.S.-citizen fathers (and eventually mothers) to be U.S. citizens from birth if the parent had resided in the United States for any period of time prior to the birth. App., *infra*, 37a-38a. But the court of appeals took the wrong lesson from that "historical background against which Congress enacted the relevant provisions." *Id.* at 37a. The relevant question is what the intent of Congress in 1952 (or 1940, when Congress first expressly addressed the situation of children born out of wedlock) would have been if a court were to hold the provision unconstitutional. And the intent of that Congress was plainly to impose physical-presence requirements on all U.S.-citizen parents of children born abroad when the other parent is not a U.S. citizen—and indeed to impose a ten-year physical-presence requirement even when the parents were *married* at the time the child was born. It would be contrary to the statutory scheme for a court to impose only a one-year continuous-physical-presence requirement on all U.S.-citizen fathers when they were *not* married at the time of the child's birth and the father did not legitimate the child until years later, whether by later marriage to the child's alien mother (as occurred in respondent's case) or otherwise. The court of appeals erred in rejecting that clear manifestation of congressional intent merely because it could not "tell with confidence"

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that "[a] person may only be naturalized as a citizen of the United States in the manner and under the conditions prescribed in [Title III of the INA], and not otherwise."

whether that change "related to the emergence of the United States as a world power after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors." *Id.* at 38a. Whatever the explanation, it could not be more clear that Congress intended in 1940 and 1952 to impose substantial physical-presence requirements in order for the children born abroad of U.S.-citizen parents to acquire U.S. citizenship from birth.

Congress enacted a general rule of imposing the longer physical-presence requirement in the case of the great majority of foreign-born children who had a U.S.-citizen parent when the other parent was an alien—married mothers, married fathers, and unmarried fathers. The shorter period applied only in the case of the child of an unwed U.S.-citizen mother. If forced to choose between the two rules, there is no basis for assuming that Congress necessarily would have preferred to let the exception swallow the rule. Indeed, since 1940, when Congress first addressed the issue of when a foreign-born child with one U.S.-citizen parent and one alien parent may obtain U.S. citizenship at birth, it has always applied to unmarried U.S.-citizen fathers the longer physical-presence requirements applicable to married U.S.-citizen fathers (and mothers). The court of appeals' remedy "convert[s] what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Bellei*, 401 U.S. at 835.

3. If the court of appeals had instead equalized the treatment of children of unwed U.S.-citizen mothers and all other U.S.-citizen parents by declaring invalid the exception in Section 1409(c) that creates the one-year continuous-physical-presence requirement for

unwed U.S.-citizen mothers, Congress could then address the situation after weighing the complex legal, policy, and foreign-relations considerations.

C. The Second Circuit's Decision Directly Conflicts With A Decision Of The Ninth Circuit

1. The court of appeals' erroneous holding that an Act of Congress is unconstitutional is sufficient to warrant this Court's review. But review is particularly appropriate here because the court of appeals' decision has created a circuit conflict, as the Second Circuit acknowledged. App., *infra*, 22a, 34a n.17. In *United States* v. *Flores-Villar*, 536 F.3d 990 (2008), aff'd by an equally divided Court, 564 U.S. 210 (2011) (per curiam), the Ninth Circuit rejected precisely the same constitutional challenge to the same 1952 statutory scheme. See *id.* at 995-997.

2. The current state of affairs is contrary to the Constitution's call for "an uniform Rule of Naturalization" to apply "throughout the United States." U.S. Const. Art. I, § 8, Cl. 4. The lack of uniformity created by the Second Circuit's decision, if allowed to stand, could greatly complicate the tasks of the Department of State, which issues passports in the United States and issues both passports and consular reports of birth abroad to U.S. citizens abroad, and of the Department of Homeland Security, which issues certificates of citizenship and is responsible for removing aliens from the United States.

This Court granted a petition for a writ of certiorari, even in the absence of a circuit conflict, in *Flores-Villar*, and affirmed the Ninth Circuit's decision by an equally divided Court. A fortiori, review by this Court of the Second Circuit's decision is warranted in this case, which has created a circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
SARAH E. HARRINGTON
Assistant to the Solicitor General
DONALD E. KEENER
ANDREW C. MACLACHLAN
Attorneys

MARCH 2016

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 11-1252

LUIS RAMON MORALES-SANTANA, AKA LUIS MORALES,
PETITIONER

v.

LORETTA E. LYNCH, UNITED STATES
ATTORNEY GENERAL, RESPONDENT

Dec. 1, 2015

ORDER

Respondent Loretta E. Lynch filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ CATHERINE O'HAGAN WOLFE
CATHERINE O'HAGAN WOLFE,
Clerk

[SEAL OMITTED]

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 11-1252-ag

LUIS RAMON MORALES-SANTANA, AKA LUIS MORALES,
PETITIONER

v.

LORETTA E. LYNCH, UNITED STATES
ATTORNEY GENERAL, RESPONDENT

Argued: Apr. 1, 2013
Decided: July 8, 2015
Amended: Oct. 30, 2015
Final Submission: Nov. 14, 2014

Before: LOHIER, CARNEY, Circuit Judges, and RAKOFF, District Judge.**

LOHIER, Circuit Judge:

Luis Ramon Morales-Santana asks us to review a March 3, 2011 decision of the Board of Immigration

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** The Honorable Jed S. Rakoff, of the United States District Court for the Southern District of New York, sitting by designation.

Appeals ("BIA") denying his motion to reopen his removal proceedings relating to his claim of derivative citizenship. Under the statute in effect when Morales-Santana was born—the Immigration and Nationality Act of 1952 (the "1952 Act")—a child born abroad to an unwed citizen mother and non-citizen father has citizenship at birth so long as the mother was present in the United States or one of its outlying possessions for a continuous period of at least one year at some point prior to the child's birth. *See* 1952 Act, § 309(c), 66 Stat. 163, 238-39 (codified at 8 U.S.C. § 1409(c) (1952)).[1] By contrast, a child born abroad to an unwed citizen father and non-citizen mother has citizenship at birth only if the father was present in the United States or one of its outlying possessions prior to the child's birth for a period or periods totaling at least ten years, with at least five of those years occurring after the age of fourteen. *See id.* § 309(a) (codified at 8 U.S.C. § 1409(a) (1952)); *see also id.* § 301(a)(7) (codified at 8 U.S.C. § 1401(a)(7) (1952)).[2] Morales-Santana's

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[1] Unless otherwise noted, references to §§ 1401 and 1409 are to those sections as they appear in the 1952 Act, and references to other statutory provisions are to those sections as they appear in the current codification.

[2] Section 1401(a)(7) provided:

> The following shall be nationals and citizens of the United States at birth: . . . a person born outside the geographical

father satisfied the requirements for transmitting citizenship applicable to unwed mothers but not the more stringent requirements applicable to unwed fathers. On appeal, Morales-Santana argues principally that this gender-based difference violates the Fifth Amendment's guarantee of equal protection and that the proper remedy is to extend to unwed fathers the benefits unwed mothers receive under § 1409(c). We agree and hold that Morales-Santana derived citi-

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limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years . . . .

Section 1409(a) provided that § 1401(a)(7) "shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this Act," provided that paternity is established "by legitimation" before the child turns 21. Section 1409(c) provided:

> Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this Act, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.

zenship at birth through his father. We accordingly REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

BACKGROUND

I. *Facts*

The following undisputed facts are drawn from the record on appeal. Morales-Santana's father, Jose Dolores Morales, was born in Puerto Rico on March 19, 1900 and acquired United States citizenship in 1917 pursuant to the Jones Act. *See* Jones Act of Puerto Rico, ch. 145, 39 Stat. 951 (codified at 8 U.S.C. § 1402 (1917)). He was physically present in Puerto Rico until February 27, 1919, 20 days before his nineteenth birthday, when he left Puerto Rico to work in the Dominican Republic for the South Porto Rico Sugar Company.

In 1962 Morales-Santana was born in the Dominican Republic to his father and his Dominican mother. Morales-Santana was what is statutorily described as "legitimat[ed]" by his father upon his parents' marriage in 1970 and admitted to the United States as a lawful permanent resident in 1975. 8 U.S.C. § 1409(a). Morales-Santana's father died in 1976.

II. *Statutory Framework*

Unlike citizenship by naturalization, derivative citizenship exists as of a child's birth or not at all. *See* 8 U.S.C. § 1409(a), (c); *cf. id.* § 1101(a)(23). The law in effect at the time of birth governs whether a child obtained derivative citizenship as of his or her birth. *See Ashton v. Gonzales*, 431 F.3d 95, 97 (2d Cir. 2005). Accordingly, the 1952 Act provides the statutory framework applicable to Morales-Santana's nationality claim.

As noted, the 1952 Act limits the ability of an unwed citizen father to confer citizenship on his child born abroad —where the child's mother is not a citizen at the time of the child's birth—more stringently than it limits the ability of a similarly situated unwed citizen mother to do the same. *Compare* 8 U.S.C. § 1401(a)(7), *with id.* § 1409(c).[3] We note that this difference in treatment of unwed citizen fathers and unwed citizen mothers, though

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[3] In addition to satisfying the requirements of § 1401(a)(7), the father must establish his paternity through legitimation of the child before the child turns 21. See 8 U.S.C. § 1409(a). As both parties agree, Morales-Santana's father legitimated his son in 1970. Morales-Santana does not contest the statute's legitimation requirement, and that requirement is not at issue on appeal. *See Nguyen v. INS*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001) (upholding as constitutional the similar legitimation requirement found in the current version of the statute, 8 U.S.C. § 1409(a)(4) (2000)).

diminished, persists in the current statute. *Compare* 8 U.S.C. § 1409(a) (2012) (applying to unwed citizen fathers § 1401(g), which requires five years of physical presence, two of which must be after age fourteen), *with id.* § 1409(c) (maintaining the 1952 Act's conferral of derivative citizenship based on an unwed mother's continuous physical presence for one year at any time prior to the child's birth).

III. *Procedural History*

In 2000 Morales-Santana was placed in removal proceedings after having been convicted of various felonies. He applied for withholding of removal on the basis of derivative citizenship obtained through his father. An immigration judge denied the application. In 2010 Morales-Santana filed a motion to reopen based on a violation of equal protection and newly obtained evidence relating to his father. The BIA rejected Morales-Santana's arguments for derivative citizenship and denied his motion to reopen.

DISCUSSION

Morales-Santana makes four arguments for derivative citizenship: (1) that his father's physical absence from the United States during the 20 days directly prior to his father's nineteenth birthday constituted a *de minimis* "gap" in physical presence, and that such gaps should not count against a finding of physical

presence for purposes of § 1401(a)(7); (2) that the South Porto Rico Sugar Company, which employed his father after his father moved to the Dominican Republic, was a multi-national United States-owned company and therefore effectively part of the United States government or an international organization as defined in 22 U.S.C. § 288, *see* 1966 Act to Amend the Immigration and Nationality Act (the "1966 Act"), 80 Stat. 1322 (codified at 8 U.S.C. § 1401(a)(7) (1966)) (counting periods of employment for certain organizations toward the statute's physical presence requirements); (3) that at the time his father moved to the Dominican Republic it was an "outlying possession" of the United States; and (4) as noted, that the different physical presence requirements applicable to unwed fathers and unwed mothers under the 1952 Act violate equal protection.

Consistent with our obligation to avoid constitutional questions if possible, we first address Morales-Santana's three statutory arguments for derivative citizenship. *See Escambia Cnty., Fla. v. McMillan*, 466 U.S. 48, 51, 104 S. Ct. 1577, 80 L. Ed. 2d 36 (1984) (per curiam).

As to both his statutory and constitutional arguments, we review *de novo* the question of Morales-Santana's derivative citizenship. *See Phong Thanh Nguyen v. Chertoff*, 501 F.3d 107, 111 (2d Cir. 2007). "If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits

that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim." 8 U.S.C. § 1252(b)(5)(A). No material facts are disputed.

I. *Statutory Arguments*

Morales-Santana contends that his father's absence from the United States during the 20 days prior to his father's nineteenth birthday constitutes a *de minimis* "gap" in his father's physical presence and that such gaps should not be held against someone who claims to have satisfied the 1952 Act's physical presence requirement. In support, Morales-Santana points to continuous physical presence requirements under the immigration laws that explicitly excuse *de minimis* absences. *See, e.g.*, *id.* § 1229b(b)(1)(A), (d)(2) (2012) (absences of 90 continuous days or fewer do not break "continuity" of physical presence for purposes of cancellation of removal for a lawful permanent resident.); *id.* §§ 1255(*l*)(3), 1255a(a)(3)(B). By its plain terms, § 1401(a)(7) had no similar exception. In any event, because Morales-Santana's father left the United States and its outlying possessions 20 days prior to his nineteenth birthday and never returned, there was no "gap" in his father's physical presence that bridged two periods of physical presence. So even if we recognized an exception to the physical presence requirement in § 1401 for *de minimis* "gaps," we would reject Morales-Santana's claim on this basis.

Relying on the 1966 Act, Morales-Santana next argues that his father's employment with the South Porto Rico Sugar Company in the Dominican Republic immediately after leaving Puerto Rico satisfied the statute's physical presence requirement by effectively continuing his physical presence through the requisite period. It is true that the 1966 Act provided that employment with the United States Government or with an international organization, as defined in 22 U.S.C. § 288, satisfied the physical presence requirement. *See* 8 U.S.C. § 1401(a)(7) (1966). But Morales-Santana's argument lacks merit because his father's employment with the South Porto Rico Sugar Company, a multinational company, did not constitute employment with the United States Government. *See Drozd v. INS*, 155 F.3d 81, 86 (2d Cir. 1998). Nor did it constitute employment with an international organization as defined in 22 U.S.C. § 288, since the South Porto Rico Sugar Company was neither "a public international organization in which the United States participates pursuant to any treaty or under the authority of any Act of Congress authorizing such participation or making an appropriation for such participation," nor "designated by the President" as such. 22 U.S.C. § 288.

As his final statutory argument, Morales-Santana contends that the Dominican Republic was an "outlying possession" of the United States for purposes of the 1952 Act when Morales-Santana's father was there in 1919. Two factors convince us that Congress did not intend to

include the Dominican Republic within the scope of the term "outlying possession" in 8 U.S.C. § 1401.[4]

First, there is no treaty or lease pursuant to which the Dominican Republic was acquired. This stands in contrast to the Philippines, Guam, Puerto Rico, and the U.S. Virgin Islands, all of which were acquired by the United States by treaty, *see* Treaty of Peace between the United States and the Kingdom of Spain, 30 Stat. 1754 (1899); Convention between the United States and Denmark, 39 Stat. 1706 (1917), and all of which were outlying possessions when the United States exercised sovereignty over them, *see Matter of V-*, 9 I. & N. Dec. 558, 561 (1962); *Matter of Y—*, 7 I. & N. Dec. 667, 668 (1958). The case of Guantanamo Bay, Cuba is a little different in that it involves both a lease and a treaty, but it yields the same result vis-à-vis the Dominican Republic. In *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 171 L. Ed. 2d 41 (2008), the Supreme Court determined that the "complete jurisdiction and control" by the United States over Guantanamo Bay constituted "*de facto*" sovereignty over it.

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[4] Congress did not define "outlying possessions" until the Nationality Act of 1940, which defined "outlying possessions" as "all territory . . . over which the United States exercises rights of sovereignty, except the Canal Zone." *See* § 101(e), 54 Stat. 1137 (codified at 8 U.S.C. § 501(e) (1940)). The 1952 Act defined the term to include only "American Samoa and Swains Island." 101(a)(29), 66 Stat. 170 (codified at 8 U.S.C. § 1101(a)(29) (1952)).

Id. at 753-55, 128 S. Ct. 2229 (quotation marks omitted). The Court added, though, that in a 1903 Lease Agreement between Cuba and the United States, the former granted the latter "complete jurisdiction and control" over Guantanamo Bay and that "[u]nder the terms of [a] 1934 [t]reaty, . . . Cuba effectively has no rights as a sovereign until the parties agree to modification of the 1903 Lease Agreement or the United States abandons" Guantanamo Bay. *Id.* at 753, 128 S. Ct. 2229. By contrast, there is no lease or treaty that conferred to the United States *de facto* or *de jure* sovereignty over the Dominican Republic.

Second, we acknowledge the historical fact that the United States exercised significant control during its military occupation of the Dominican Republic from 1916 to 1924. *See Ingenio Porvenir C. Por A. v. United States*, 70 Ct. Cl. 735, 738 (1930). But that control did not extinguish the sovereignty of the Dominican Republic. Indeed, the Proclamation of the Military Occupation of Santo Domingo by the United States specifically declared that the purpose of the temporary military occupation was "to give aid to [the Dominican Republic] in returning to a condition of internal order" without "destroying the sovereignty of" the Dominican Republic. 11 Supp. Am. J. Int'l L. 94, 94-96 (1917) (Nov. 29, 1916 Proclamation); *see also* Bruce J. Calder, *The Impact of Intervention: The Dominican Republic During the U.S. Occupation of 1916-1924*, xxvii, 17, 205 (2d ed. 2006).

Having rejected Morales-Santana's statutory arguments for derivative citizenship, we now consider his constitutional equal protection argument.

II. *Equal Protection*

Morales-Santana argues principally that the 1952 Act's treatment of derivative citizenship conferral rights violates the Fifth Amendment's guarantee of equal protection.[5] As we have explained, under the 1952 Act, an unwed citizen mother confers her citizenship on her child (born abroad to a non-citizen biological father) so long as she has satisfied the one-year continuous presence requirement prior to the child's birth. The single year of presence by the mother can occur at any time prior to the child's birth—including, for example, from the mother's first birthday until her second birthday. An unwed citizen father, by contrast, faces much more stringent re-

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[5] Morales-Santana has standing to assert this equal protection claim on behalf of his father since Morales-Santana alleges that his father suffered an injury in fact, that his father bears a close relation to him, and that his father's ability to assert his own interests is hindered because his father is deceased. *See Campbell v. Louisiana*, 523 U.S. 392, 397, 118 S. Ct. 1419, 140 L. Ed. 2d 551 (1998) (citing *Powers v. Ohio*, 499 U.S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)); *see also Miller v. Albright*, 523 U.S. 420, 433, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (opinion of Stevens, J.); *id.* at 449-50, 118 S. Ct. 1428 (O'Connor, J., concurring); *id.* at 454 n.1, 118 S. Ct. 1428 (Scalia, J., concurring); *id.* at 473 (Breyer, J., dissenting).

quirements under 8 U.S.C. § 1409(a), which incorporates § 1401(a)(7). He is prevented from transmitting his citizenship (to his child born abroad to a non-citizen mother) unless he was physically present in the United States or an outlying possession prior to the child's birth for a total of at least ten years.[6] Because five of those years must follow the father's fourteenth birthday, an unwed citizen father cannot transmit his citizenship to his child born abroad to a non-citizen mother before the father's nineteenth birthday. Eighteen-year-old citizen fathers and their children are out of luck.

As both parties agree, had Morales-Santana's mother, rather than his father, been a citizen continuously present in Puerto Rico until 20 days prior to her nineteenth birthday, she would have satisfied the requirements to confer derivative citizenship on her child. It is this gender-based difference in treatment that Morales-Santana claims violated his father's right to equal protection.

The Government asserts that the difference is justified by two interests: (1) ensuring a sufficient connection between citizen children and the United States, and (2) avoiding statelessness. In what follows, we apply intermediate scrutiny to assess these asserted interests, and we conclude that neither interest is advanced by the

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[6] As noted, the father must also satisfy a legitimation requirement. *See* 8 U.S.C. § 1409(a).

statute's gender-based physical presence requirements. After determining that these physical presence requirements violate equal protection, we apply the statute's severance clause and determine that Morales-Santana, under the statute stripped of its constitutional defect, has citizenship as of his birth.

A. *Level of Scrutiny*

We apply intermediate, "heightened" scrutiny to laws that discriminate on the basis of gender. *United States v. Virginia*, 518 U.S. 515, 531-33, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). Under intermediate scrutiny, the government classification must serve actual and important governmental objectives, and the discriminatory means employed must be substantially related to the achievement of those objectives. *Nguyen v. INS*, 533 U.S. 53, 68, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001); *Virginia*, 518 U.S. at 533, 116 S. Ct. 2264. Furthermore, the justification for the challenged classification "must be genuine, not hypothesized or invented *post hoc* in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females." *Virginia*, 518 U.S. at 533, 116 S. Ct. 2264.

In urging us to apply rational basis scrutiny instead, the Government relies on *Fiallo v. Bell*, 430 U.S. 787, 97 S. Ct. 1473, 52 L. Ed. 2d 50 (1977). In *Fiallo*, the Su-

preme Court applied rational basis scrutiny to a section of the 1952 Act that gave special preference for admission into the United States to non-citizens born out of wedlock seeking entry by virtue of a relationship with their citizen mothers, but not to similarly situated non-citizens seeking entry by virtue of a relationship with their citizen fathers. *See id.* at 798, 97 S. Ct. 1473. The Court reasoned that rational basis scrutiny was warranted because "over no conceivable subject is the legislative power of Congress more complete than it is over *the admission of aliens*," and "[o]ur cases have long recognized the power *to expel or exclude aliens* as a fundamental sovereign attribute exercised by the Government's political departments." *Id.* at 792, 97 S. Ct. 1473 (emphases added) (quotation marks omitted); *see also Kleindienst v. Mandel*, 408 U.S. 753, 766, 92 S. Ct. 2576, 33 L. Ed. 2d 683 (1972) (Congress has "plenary power" to make rules for the admission and exclusion of non-citizens. (quotation marks omitted)).

But *Fiallo* is distinguishable. In *Fiallo*, the children's alienage implicated Congress's "exceptionally broad power" to admit or remove non-citizens. *Fiallo*, 430 U.S. at 794, 97 S. Ct. 1473. Here, by contrast, there is no similar issue of alienage that would trigger special deference. Because Morales-Santana instead claims pre-existing citizenship at birth, his challenge does not implicate Congress's "power to admit or exclude foreigners," *id.* at 795 n.6, 97 S. Ct. 1473 and therefore is not governed by *Fiallo*.

Our view of *Fiallo*'s limited scope is grounded in Supreme Court and circuit caselaw. As an initial matter, we note that the Supreme Court has never applied the deferential *Fiallo* standard to issues of gender discrimination under § 1409, despite being asked to do so on at least three occasions. *See Miller v. Albright*, 523 U.S. 420, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (declining to apply *Fiallo*); *Nguyen v. INS*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001) (applying heightened scrutiny); *Flores-Villar* v. *United States*, — U.S. —, 131 S. Ct. 2312, 180 L. Ed. 2d 222 (2011) (per curiam) (affirming without opinion by divided 4-4 vote). Justice Stevens' opinion in *Miller* succinctly described *Fiallo*'s limitation: "It is of significance that the petitioner in this case, unlike the petitioners in *Fiallo*, . . . is not challenging the denial of an application for special [immigration] status. She is contesting the Government's refusal to . . . treat her as a citizen. If she were to prevail, the judgment . . . would confirm her pre-existing citizenship." *Miller*, 523 U.S. at 432, 118 S. Ct. 1428 (opinion of Stevens, J.); *see also id.* at 429, 118 S. Ct. 1428 ("*Fiallo* . . . involved the claims of . . . aliens to a special immigration preference, whereas here petitioner claims that she is, and for years has been, an American citizen.").

Although no opinion in *Miller* received a majority of votes, we observed in *Lake v. Reno* that "seven justices in *Miller* would have applied heightened scrutiny . . . [to INA] section 309(a)." 226 F.3d 141, 148 (2d Cir. 2000),

vacated sub nom. Ashcroft v. Lake, 533 U.S. 913, 121 S. Ct. 2518, 150 L. Ed. 2d 691 (2001) (citing *Nguyen*), *abrogated on other grounds by Lake v. Ashcroft*, 43 Fed. Appx. 417, 418 (2d Cir. 2002). Later, in *Lewis v. Thompson*, we explained *Lake*'s holding in a way that makes it clear that heightened scrutiny, rather than *Fiallo*'s more deferential standard of review, should apply to Morales-Santana's claim: "[W]e have already held in *Lake*, drawing an inference from the various opinions of the Justices in *Miller*, that citizen claimants with an equal protection claim deserving of heightened scrutiny do not lose that favorable form of review simply because the case arises in the context of immigration." 252 F.3d 567, 591 (2d Cir. 2001); *see also id.* at 590 ("As we recognized in *Lake*, *Fiallo* itself made clear that the reduced threshold of justification for governmental action *that applied to immigrants* did not apply to citizens." (emphasis added) (quotation marks omitted)). Our sister circuits that have considered *Fiallo*'s application to claims similar to Morales-Santana's are in accord. *See Nguyen v. INS*, 208 F.3d 528, 535 (5th Cir. 2000) (noting that "the statute in *Fiallo* dealt with the claims of aliens for special immigration preferences for aliens, whereas the petitioner's claim in this case is that he is a citizen"), *aff'd*, 533 U.S. 53, 121 S. Ct. 2053, 150 L. Ed. 2d 115 (2001); *Breyer v. Meissner*, 214 F.3d 416, 425 (3d Cir. 2000) (applying heightened scrutiny to § 1993 of the Revised Statutes of 1874, a predecessor to § 1409, because it "created a gender

classification with respect to [petitioner's] mother's ability to pass her citizenship to her foreign-born child at his birth"); *United States v. Ahumada-Aguilar*, 189 F.3d 1121, 1126 (9th Cir. 1999) (applying *Miller* to "f[i]nd § 1409(a)(4) unconstitutional by applying heightened scrutiny"), *vacated*, 533 U.S. 913, 121 S. Ct. 2518, 150 L. Ed. 2d 691 (2001) (citing *Nguyen*), *abrogated on other grounds by* 295 F.3d 943 (9th Cir. 2002); *cf. United States v. Flores-Villar*, 536 F.3d 990, 996 n.2 (9th Cir. 2008) ("Like the Supreme Court in *Nguyen*, we will assume that intermediate scrutiny applies."), *aff'd by an equally divided Court*, — U.S. —, 131 S. Ct. 2312, 180 L. Ed. 2d 222.

For these reasons, we conclude that the gender-based scheme in §§ 1401 and 1409 can be upheld only if the Government shows that it is substantially related to an actual and important governmental objective. *See Virginia*, 518 U.S. at 531, 533, 535-36, 116 S. Ct. 2264; *Miss. Univ. for Women v. Hogan*, 458 U.S. 718, 724, 102 S. Ct. 3331, 73 L. Ed. 2d 1090 (1982). In assessing the validity of the gender-based classification, moreover, classification. *See, e.g., Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 151, 100 S. Ct. 1540, 64 L. Ed. 2d 107 (1980); *Orr v. Orr*, 440 U.S. 268, 281, 99 S. Ct. 1102, 59 L. Ed. 2d 306 (1979); *Weinberger v. Wiesenfeld*, 420 U.S. 636, 653, 95 S. Ct. 1225, 43 L. Ed. 2d 514 (1975).

B. *Governmental Interests and Tailoring*

Having determined that intermediate scrutiny applies, we examine the two interests that the Government claims support the statute's gender-based distinction.

1. *Ensuring a Sufficient Connection Between the Child and the United States*

The Government asserts that Congress passed the 1952 Act's physical presence requirements in order to "ensur[e] that foreign-born children of parents of different nationalities have a sufficient connection to the United States to warrant citizenship." Respondent's Br. 38-39. As both parties agree, this interest is important, and Congress actually had it in mind when requiring some period of physical presence before a citizen parent could confer citizenship on his or her child born abroad. *See* Petitioner's Br. 35 n.17 (citing *Weedin v. Chin Bow*, 274 U.S. 657, 666-67, 47 S. Ct. 772, 71 L. Ed. 1284 (1927)).

The Government invokes this important interest but fails to justify the 1952 Act's different treatment of mothers and fathers by reference to it. It offers no reason, and we see no reason, that unwed fathers need more time than unwed mothers in the United States prior to their child's birth in order to assimilate the values that the

statute seeks to ensure are passed on to citizen children born abroad.

We recognize that our determination conflicts with the decision of the Ninth Circuit in *Flores-Villar*, 536 F.3d 990, which addressed the same statutory provisions and discussed the same governmental interest in ensuring a connection between child and country. The Ninth Circuit concluded that in addition to preventing or reducing statelessness—an objective we address below—"[t]he residence differential . . . furthers the objective of developing a tie between the child, his or her father, and this country." *Flores-Villar*, 536 F.3d at 997. The Ninth Circuit provided no explanation for its conclusion, and the Government provides none here.

Instead, the Government relies on *Nguyen* to explain why the different physical presence requirements for unwed men and women reflect a concern with ensuring an adequate connection between the child and the United States. We are not persuaded. In *Nguyen*, the Court upheld the Immigration and Nationality Act's requirement that a citizen father seeking to confer derivative citizenship on his foreign-born child take the affirmative step of either legitimating the child, declaring paternity

under oath, or obtaining a court order of paternity.[7] *See Nguyen*, 533 U.S. at 62, 121 S. Ct. 2053; 8 U.S.C. § 1409(a)(4) (2000). The *Nguyen* Court determined that two interests supported the legitimation requirement for citizen fathers of children born abroad.

The first interest, "assuring that a biological parent-child relationship exists," *Nguyen*, 533 U.S. at 62, 121 S. Ct. 2053; *see Miller*, 523 U.S. at 435-36, 118 S. Ct. 1428 is irrelevant to the 1952 Act's physical presence requirements because derivative citizenship separately requires unwed citizen fathers to have legitimated their foreign-born children. Here, Morales-Santana's father established his biological tie to Morales-Santana by legitimating him. His physical presence in Puerto Rico for ten years as opposed to one year prior to Morales-Santana's birth would have provided no additional assurance that a biological tie existed.

The *Nguyen* Court identified a second interest in ensuring "that the child and the citizen parent have some demonstrated opportunity or potential to develop" a "real, meaningful relationship." *Nguyen*, 533 U.S. at 64-65, 121 S. Ct. 2053. The Court explained that a biological mother, by virtue of giving birth to the child, "knows that the

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[7] For brevity, we refer to these as constituting a "legitimation requirement," though legitimation is just one of three ways of satisfying the statutory provision.

child is in being and is hers," but that an unwed biological father might in some cases not even "know that a child was conceived, nor is it always clear that even the mother will be sure of the father's identity." *Id.* at 65, 121 S. Ct. 2053. Rather than requiring a case-by-case analysis of whether a father or a mother has a "real, meaningful relationship" with a child born abroad, "Congress enacted an easily administered scheme to promote the different but still substantial interest of ensuring at least an opportunity for a parent-child relationship to develop." *Id.* at 69, 121 S. Ct. 2053. This interest in ensuring the "opportunity for a real, meaningful relationship" between parent and child is likewise not relevant to the 1952 Act's physical presence requirements. By legitimating his son, Morales-Santana's father took the affirmative step of demonstrating that an opportunity for a meaningful relationship existed. And again, requiring that Morales-Santana's father be physically present in Puerto Rico prior to Morales-Santana's birth for ten years instead of one year would have done nothing to further ensure that an opportunity for such a relationship existed.

So we agree that unwed mothers and fathers are *not* similarly situated with respect to the two types of parent-to-child "ties" justifying the legitimation requirement at issue in *Nguyen*. But unwed mothers and fathers *are* similarly situated with respect to *how long* they should be present in the United States or an outlying possession prior to the child's birth in order to have assimilated

citizenship-related values to transmit to the child. Therefore, the statute's gender-based distinction is not substantially related to the goal of ensuring a sufficient connection between citizen children and the United States.

2. *Preventing Statelessness*

Having concluded that the Government's interest in establishing a connection between the foreign-born child and the United States does not explain or justify the gender-based distinction in the 1952 Act's physical presence requirements, we now turn to the Government's other asserted interest. The Government argues that Congress enacted different physical presence requirements in § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) to reduce the level of statelessness among newborns. For example, a child born out of wedlock abroad may be stateless if he is born inside a country that does not confer citizenship based on place of birth and neither of the child's parents conferred derivative citizenship on him.

The avoidance of statelessness is clearly an important governmental interest. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160-61, 83 S. Ct. 554, 9 L. Ed. 2d 644 (1963); *Trop v. Dulles*, 356 U.S. 86, 102, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958) (plurality opinion). Contrary to the Government's claim, though, avoidance of statelessness does not appear to have been Congress's actual purpose in

establishing the physical presence requirements in the 1952 Act, *see Virginia*, 518 U.S. at 533, 116 S. Ct. 2264 and in any event the gender-based distinctions in the 1952 Act's physical presence requirements are not substantially related to that objective.

a. *Actual Purpose*

Some historical background is useful to understand Congress's purpose in establishing the 1952 Act's gender-based physical presence requirements. Until 1940, a citizen father whose child was born abroad transmitted his citizenship to that child if the father had resided in the United States for *any period* of time prior to the child's birth. *See Rogers v. Bellei*, 401 U.S. 815, 823-25, 91 S. Ct. 1060, 28 L. Ed. 2d 499 (1971) (discussing the Act of March 26, 1790, 1 Stat. 103, and successive statutes); Act of May 24, 1934, ch. 344, 48 Stat. 797; Nationality Act of 1940 (the "1940 Act"), ch. 876, § 201(g), 54 Stat. 1137, 1139. Consistent with common law notions of coverture, and with the notion that the husband determined the political and cultural character of his dependents (wife and children included), prior to 1934 married women had no statutory right to confer their own citizenship.[8] *See Brief [of] Amici*

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[8] In 1934 Congress granted citizen mothers, whether married or unmarried, the right to confer citizenship on their children born abroad if the mother satisfied the same minimal residency require-

Curiae of Professors of History, Political Science, and Law in Support of Petitioner at 9, *Flores-Villar v. United States*, — U.S. —131 S. Ct. 2312, 180 L. Ed. 2d 222, (2010), 2010 WL 2602009; Candice Lewis Bredbenner, *A Nationality of Her Own: Women, Marriage, and the Law of Citizenship* 84 (1998). But for *unmarried* citizen mothers, the State Department's practice since at least 1912 was to grant citizenship to their foreign-born children on the theory that an unmarried mother "stands in the place of the father" and is in any event "bound to maintain [the child] as its natural guardian." *To Revise and Codify the Nationality Laws of the United States Into a Comprehensive Nationality Code: Hearing Before the H. Comm. on Immigration and Naturalization*, 76th Cong. 431 (1945) (quotation marks omitted).

In 1940 Congress for the first time explicitly addressed the situation of children born out of wedlock. It enacted Section 205 of the 1940 Act, 54 Stat. at 1139-40, which provided that citizen fathers and married citizen mothers could transmit citizenship to their child born abroad only after satisfying an age-calibrated ten-year physical presence requirement, but that *unmarried* citizen mothers could confer citizenship if they had resided in the United States at any point prior to the child's birth. The 1952

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ment applicable to citizen fathers. *See* Act of May 24, 1934, ch. 344, § 1, 48 Stat. 797.

Act retained this basic statutory structure, though it imposed a somewhat more stringent requirement that unmarried mothers have been physically present in the United States for a continuous period of one year in order to confer citizenship. 8 U.S.C. § 1409(c).

Neither the congressional hearings nor the relevant congressional reports concerning the 1940 Act contain any reference to the problem of statelessness for children born abroad.[9] The congressional hearings concerning the 1952 Act are similarly silent about statelessness as a driving concern.[10] Notwithstanding the absence of relevant dis-

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[9] *Cf.* Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 Yale L.J. 2134, 2205 n.283 (2014) ("[I]n the many hundreds of pre-1940 administrative memos I have read that defend or explain recognition of the nonmarital foreign-born children of American mothers as citizens, I have identified exactly one memo by a U.S. official that mentions the risk of statelessness for the foreign-born nonmarital children of American mothers as a concern." (citing Memorandum from Green Hackworth, Office of the Solicitor, U.S. Dep't of State, to Richard Flournoy, Office of the Solicitor, U.S. Dep't of State (Aug. 14, 1928) (on file with National Archives and Records Administration, Relevant Group 59, Central Decimal File 131))).

[10] The Government does cite one congressional report in which statelessness was mentioned in conjunction with the 1952 Act. A Senate Report dated January 29, 1952 mentions the problem of statelessness in explaining why the 1952 Act eliminated a provision in the 1940 Act that had conditioned a citizen mother's ability to

cussion concerning the problem of statelessness for children born abroad in the legislative history, the Government points to the Executive Branch's explanatory comments to Section 204 of the proposed nationality code that Congress would ultimately enact as the 1940 Act. *See* 76th Cong. 431. These comments refer to a 1935 law review article entitled *A Comparative Study of Laws Relating to Nationality at Birth and to Loss of Nationality*, 29 Am. J. Int'l L. 248 (1935), by Durward V. Sandifer.[11] According to the article, in 1935 approximately

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transmit nationality to her child on the father's failure to legitimate the child prior to the child's eighteenth birthday. *See* 1940 Act, § 205, 54 Stat. at 1140 ("*In the absence of . . . legitimation or adjudication* [during the child's minority], . . . the child" born abroad to an unmarried citizen mother "shall be held to have acquired at birth [the mother's] nationality status." (emphases added)). The 1952 Act eliminated this provision, allowing the mother to transmit citizenship independent of the father's actions. S. Rep. No. 1137, at 39 (1952) ("This provision establishing the child's nationality as that of the [citizen] mother *regardless of legitimation or establishment of paternity* is new. It insures that the child shall have a nationality at birth." (emphasis added)).

Although the Report reflects congressional awareness of statelessness as a problem, it does not purport to justify the gender-based distinctions in the physical presence provisions at issue in this appeal.

[11] Contrary to the Government's assertion, the Sandifer article does not indicate that it was "conducted by the State Department." Rather, Sandifer, who worked at the State Department at the time he wrote the article, explains at the outset that he decided to write

thirty countries had statutes assigning children born out of wedlock the citizenship of their mother. *Id.* at 258. From the comments and the article, the Government urges us to infer that "Congress was aware" there existed "a substantial risk that a child born to an unwed U.S. citizen mother in a country employing [laws determining citizenship based on lineage, rather than place of birth] would be stateless at birth unless the mother could pass her citizenship to her child," and that this risk was "unique" to the children of unwed citizen mothers. Respondent's May 8, 2013 Supp. Br. 2, 6-7.[12]

Based on our review of the Executive Branch's explanatory comments and the Sandifer article, we decline the Government's invitation. The explanatory comments do not mention statelessness and do not refer to the Sandifer article's discussion of statelessness. In any event, the Sandifer article itself does not support the Government's argument that the children of unwed citizen mothers faced a greater risk of statelessness than the children of unwed citizen fathers.

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it at the suggestion of a colleague, not pursuant to an official directive. *See* Sandifer, *Comparative Study*, 29 Am. J. Int'l L. at 248.

[12] In response to our order requesting supplemental briefing on the issue, the Government was unable to furnish any other evidence that Congress enacted or the Executive encouraged the 1940 Act's or the 1952 Act's gender-based physical presence requirements due to concerns about statelessness.

While the Executive Branch's comments ignore the problem of statelessness, they arguably reflect gender-based generalizations concerning who would care for and be associated with a child born out of wedlock.[13] Other contemporary administrative memoranda similarly ignore the risk of statelessness for children born out of wedlock abroad to citizen mothers.[14]

In sum, we discern no evidence (1) that Congress enacted the 1952 Act's gender-based physical presence requirements out of a concern for statelessness, (2) that the problem of statelessness was in fact greater for children of unwed citizen mothers than for children of unwed citizen fathers, or (3) that Congress believed that the problem of

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[13] The comments reflect the view that the mother "is bound to maintain" "custody and control of . . . a child [born out of wedlock] as against the putative father" as its "natural guardian" and that "[t]he mother, as guardian by nurture, has the right to the custody and control of her bastard child." 76th Cong. 431 (quotation marks omitted); *see also* Collins, 123 Yale L.J. at 2205 ("[T]he historical record reveals that the pronounced gender asymmetry of the [1940] Nationality Act's treatment of nonmarital foreign-born children of American mothers and fathers was shaped by contemporary maternalist norms regarding the mother's relationship with her nonmarital child—and the father's lack of such a relationship."); *id.* at 2203 (quoting as representative of contemporary views an internal letter to a State Department official stating that "as a practical matter, it is well known that almost invariably it is the mother who concerns herself with [the nonmarital] child").

[14] *See* Collins, 123 Yale L.J. at 2205 n.283.

statelessness was greater for children of unwed citizen mothers than for children of unwed citizen fathers. We conclude that neither reason nor history supports the Government's contention that the 1952 Act's gender-based physical presence requirements were motivated by a concern for statelessness, as opposed to impermissible stereotyping.

b. *Substantial Relationship Between Ends and Means*

Even assuming for the sake of argument that preventing statelessness was Congress's actual motivating concern when it enacted the physical presence requirements, we are persuaded by the availability of effective gender-neutral alternatives that the gender-based distinction between § 1409(a) (incorporating § 1401(a)(7)) and § 1409(c) cannot survive intermediate scrutiny. *See Wengler*, 446 U.S. at 151 (invalidating a gender-based classification where a gender-neutral approach would serve the needs of both classes); *Orr*, 440 U.S. at 282-83, 99 S. Ct. 1102 ("A gender-based classification which, as compared to a gender-neutral one, generates additional benefits only for those it has no reason to prefer cannot survive equal protection scrutiny."). As far back as 1933, Secretary of State Cordell Hull proposed just such a gender-neutral alternative in a letter to the Chairman of the House Committee on Immigration and Naturalization. Secretary Hull suggested that the immigration laws be revised

"to obtain the objective of parity between the sexes in nationality matters" by "remov[ing] . . . discrimination between" mothers and fathers "with regard to the transmission of citizenship to children born abroad." Hull proposed the following language:

> PROPOSED AMENDMENT . . .
>
> (d) A child hereafter born out of wedlock beyond the limits and jurisdiction of the United States and its outlying possessions to an American parent who has resided in the United States and its outlying possessions, there being no other legal parent under the law of the place of birth, shall have the nationality of such American parent.

Letter from Sec'y Hull to Chairman Dickstein (Mar. 27, 1933) (Respondent's May 8, 2013 Supp. Br. Ex. B).[15]

And unlike the legitimation requirement at issue in *Nguyen*, which could be satisfied by, for example, "a written acknowledgment of paternity under oath," the physical presence requirement that Morales-Santana challenges imposes more than a "minimal" burden on

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[15] In 1936, an Executive Branch official who participated in drafting the 1940 Act recognized that "Section 204 [of the 1940 Act] as drawn up by the Committee slightly discriminates in favor of women." Letter from John J. Scanlon to Ruth B. Shipley, U.S. Dep't of State (Mar. 7, 1936) (Petitioner's Nov. 14, 2014 Supp. Br. Ex. 4); *see also* Collins, 123 Yale L.J. at 2235.

unwed citizen fathers. *See Nguyen*, 533 U.S. at 70-71, 121 S. Ct. 2053. It adds to the legitimation requirement ten years of physical presence in the United States, five of which must be after the age of fourteen. In our view, this burden on a citizen father's right to confer citizenship on his foreign-born child is substantial.[16]

For these reasons, the gender-based distinction at the heart of the 1952 Act's physical presence requirements is not substantially related to the achievement of a permissible, non-stereotype-based objective.[17]

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[16] As we have already noted, the burden is actually *impossible* for eighteen-year-old unwed citizen fathers to satisfy.

[17] We note once more that our conclusion differs from that of the Ninth Circuit in *Flores-Villar*. There the Ninth Circuit assumed, *sub silentio*, that Congress's enactment of the physical presence requirements was actually motivated by concern for reduction in the risk of statelessness. It also nominally assumed, without deciding, that intermediate scrutiny applied. *See* 536 F.3d at 996 & n.2. We disagree with the Ninth Circuit that the Government has carried its burden of showing an "exceedingly persuasive justification" for the statute's gender-based classification as a means of addressing the problem of statelessness. *See Kirchberg v. Feenstra*, 450 U.S. 455, 461, 101 S. Ct. 1195, 67 L. Ed. 2d 428 (1981). The Government has not shown that the problem arose—or was perceived to arise—more often with citizen mothers than with citizen fathers of children born out of wedlock abroad. *See, e.g.*, Sandifer, *Comparative Study*, 29 Am. J. Int'l L. at 254; *Brief of*

3. *Remedy*

We now turn to the most vexing problem in this case. Here, two statutory provisions—§ 1409(c) and (a)[18]—combine to violate equal protection. What is the remedy for this violation of equal protection, where citizenship is at stake? Ordinarily, "when the 'right invoked is that to equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740, 104 S. Ct. 1387, 79 L. Ed. 2d 646 (1984) (emphasis omitted) (quoting *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247, 52 S. Ct. 133, 76 L. Ed. 265 (1931)); *accord Califano v. Westcott*, 443 U.S. 76, 89, 99 S. Ct. 2655, 61 L. Ed. 2d (1979).

As we see it, "equal treatment" might be achieved in any one of three ways: (1) striking both § 1409(c) and (a) entirely; (2) severing the one-year continuous presence provision in § 1409(c) and requiring every unwed citizen parent to satisfy the more onerous ten-year requirement if

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Amici Curiae Scholars on Statelessness in Support of Petitioner, *Flores-Villar v. United States*, — U.S. —, 131 S. Ct. 2312, 180 L. Ed. 2d 222 (2010), 2010 WL 2569160.

[18] Recall that § 1409(a) incorporates the physical presence requirement from § 1401(a)(7), which applies to married parents of mixed citizenship.

the other parent lacks citizenship; or (3) severing the ten-year requirement in §§ 1409(a) and 1401(a)(7) and requiring every unwed citizen parent to satisfy the less onerous one-year continuous presence requirement if the other parent lacks citizenship. In selecting among these three options, we look to the intent of Congress in enacting the 1952 Act. *See Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 292 n.31, 107 S. Ct. 683, 93 L. Ed. 2d 613 (1987) ("[T]he Court must look to the intent of the . . . legislature to determine whether to extend benefits or nullify the statute."). For reasons we explain below, we conclude that the third option is most consistent with congressional intent.

We eliminate the first option with ease. The 1952 Act contains a severance clause that provides: "If any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . . shall not be affected thereby." 1952 Act § 406; *cf. Nguyen*, 533 U.S. at 72, 121 S. Ct. 2053 ("[S]everance is based on the assumption that Congress would have intended the result."). The clause makes clear that only one of the provisions in § 1409, rather than both, should be severed as constitutionally infirm. It also means that our holding, which relates only to the application of these provisions to unmarried parents, should not be construed to affect the physical presence requirement for married parents.

We reject the second option—contracting, as opposed to extending, the right to derivative citizenship—with more circumspection. The Government urges us to adopt this option, arguing that the alternative allows the exception for unwed mothers to swallow the rule, thereby inflicting more damage to the statute's language and structure and reflecting a more radical change than the 1952 Congress intended. This argument fails for two reasons. First, the argument misunderstands our task, which is not to devise the "cleanest" way to alter the wording and structure of the statute, but to determine what result Congress intended in the event the combined statutory provisions were deemed unconstitutional. Second, the Government's argument neglects the historical background against which Congress enacted the relevant provisions. Although a close call, history does not convince us that the members of Congress passing the 1952 Act would have viewed the extension of the one-year requirement as a more radical change than the alternative, in which all unwed citizen parents must satisfy the ten-year age-calibrated requirement if the other parent lacks citizenship. To the contrary, the ten-year requirement for fathers and married mothers imposed by Congress in 1940 appears to have represented a significant departure from long-established historical practice. *See Rogers*, 401 U.S. at 823-26, 91 S. Ct. 1060 (reviewing the history of derivative citizenship statutes from the Act of March 26, 1790, 1 Stat. 103, through the 1952 Act and

concluding that "for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent, moved in a direction of leniency for the child"). From 1934 until the enactment of the 1940 Act, for example, women had the statutory right to confer citizenship on their foreign-born children and were required merely to have resided in the United States for *any* duration prior to the child's birth. The same bare-minimum requirement applied to men for the vast majority of the time since the founding, from 1790 until 1940. *See id.*; *Weedin*, 274 U.S. at 664-67, 47 S. Ct. 772; Act of May 24, 1934, ch. 344, § 1993, 48 Stat. 797; 1940 Act. Moreover, the 1952 Act's addition of a one-year continuous physical presence requirement for unmarried citizen mothers represented a relatively minor change in the baseline minimal residency requirement applicable to all men and women prior to 1940. On the other hand, of course, we recognize that the 1952 Congress, presumably with the benefit of this long history, nevertheless decided to retain the ten-year residency requirement. Whether this related to the emergence of the United States as a world power after World War II or an increasing number of children born of mixed-nationality parents, or some other set of factors, we cannot tell with confidence.

Neither the text nor the legislative history of the 1952 Act is especially helpful or clear on this point, and ultimately what tips the balance for us is the binding precedent that cautions us to extend rather than contract bene-

fits in the face of ambiguous congressional intent. *See, e.g.*, *Westcott*, 443 U.S. at 89, 99 S. Ct. 2655 ("In previous cases involving equal protection challenges to underinclusive federal benefits statutes, this Court has suggested that extension, rather than nullification, is the proper course." (citing *Jimenez v. Weinberger*, 417 U.S. 628, 637-38, 94 S. Ct. 2496, 41 L. Ed. 2d 363 (1974), and *Frontiero v. Richardson*, 411 U.S. 677, 691 n.25, 93 S. Ct. 1764, 36 L. Ed. 2d 583 (1973) (plurality opinion))); *Heckler*, 465 U.S. at 738, 739 n.5, 104 S. Ct. 1387; *Weinberger*, 420 U.S. at 641-42, 653, 95 S. Ct. 1225; *Soto-Lopez v. N.Y.C. Civil Serv. Comm'n*, 755 F.2d 266, 280-81 (2d Cir. 1985). Indeed, we are unaware of a single case in which the Supreme Court has contracted, rather than extended, benefits when curing an equal protection violation through severance.

Lastly, the Government contends that, in giving Morales-Santana the relief he seeks, we are granting citizenship, which we lack the power to do. This argument rests on a mistaken premise. Although courts have no power to confer "citizenship on a basis other than that prescribed by Congress," *Miller*, 523 U.S. at 453, 118 S. Ct. 1428 (Scalia, J., concurring), Morales-Santana has not asked us to confer citizenship, and we do not do so. Instead, Morales-Santana asks that we exercise our traditional remedial powers "so that the statute, free of its constitutional defect, can operate to determine whether citizenship was transmitted at birth." *Nguyen*, 533 U.S.

at 95-96, 121 S. Ct. 2053 (O'Connor, J., dissenting) (citing *Miller*, 523 U.S. at 488-89, 118 S. Ct. 1428 (Breyer, J., dissenting)); *cf. id.* at 73-74, 121 S. Ct. 2053 (Scalia, J., concurring). In other words, if Morales-Santana "were to prevail, the judgment in [his] favor would confirm [his] pre-existing citizenship rather than grant [him] rights that [he] does not now possess." *Miller*, 523 U.S. at 432, 118 S. Ct. 1428 (opinion of Stevens, J.). Correcting the constitutional defect here would at a minimum entail replacing the ten-year physical presence requirement in § 1401(a)(7) (and incorporated within § 1409(a)) with the one-year continuous presence requirement in § 1409(c).[19] The alternative remedy suggested by the Government—that all unwed parents be subject to the more onerous ten-year requirement—would prove no less controversial: we have no more power to strip citizenship

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[19] When applied to unmarried parents, § 1401(a)(7) as modified would read:

> a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a *continuous period of one year*: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(first emphasis added to reflect change).

conferred by Congress than to confer it. Nor, finally, has Congress authorized us to avoid the question. *See* 8 U.S.C. § 1252(b)(5)(A) ("If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court *shall* decide the nationality claim." (emphasis added)). Conforming the immigration laws Congress enacted with the Constitution's guarantee of equal protection, we conclude that Morales-Santana is a citizen as of his birth.

CONCLUSION

For the foregoing reasons, we REVERSE the BIA's decision and REMAND for further proceedings consistent with this opinion.

APPENDIX C

U.S. Department of Justice
Executive Office for
Immigration Review

Falls Church, Virginia 22041

Decision of the Board of
Immigration Appeals

File: A034 200 190 - Fishkill, NY Date: [Mar. 3, 2011]

In re: LUIS RAMON MORALES-SANTANA a.k.a. Luis Morales

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Laura A. Michalec
Assistant Chief Counsel

APPLICATION: Reopening

ORDER:

The respondent's motion is untimely filed and number-barred and has not been shown to qualify for any exception to the filing requirements imposed on motions to reopen removal proceedings. *See* sections 240(c)(7)(A), (C)(i) of the Immigration and Na-

tionality Act, 8 U.S.C. §§ 1229a(c)(7)(A), (C)(i); 8 C.F.R. § 1003.2(c)(2). Moreover, the evidence submitted along with the respondent's present motion does not demonstrate an exception to the physical presence requirement for purposes of demonstrating that he derived United States citizenship from his father. *See* former section 301 (a)(7) of the Immigration and Nationality Act, 8 U.S.C. § 1401(a)(7). While former section 301(a)(7) of the Act provides that a citizen parent's period(s) of employment with the United States government or with an international organization may be included in order to satisfy the physical presence requirement, that the respondent's father was employed by a multinational apparently United States owned company does not demonstrate that the respondent's father was employed by the United States government. Nor does the record contain any evidence indicating that such company was an international organization within the meaning of the International Organizations Immunities Act, which only applies to international organizations in which the United States participated pursuant to a treaty or act of Congress. *See* 22 U.S.C. § 288; *see also* former section 301(a)(7) of the Act. Nor, as the respondent concedes, was his father absent for a period of less than 60 days, which might have been considered in calculating the continuity of his father's period of physical presence. Consequently, the respondent

cannot satisfy the physical presence requirement for purposes of demonstrating that he derived citizenship from his father.

On this record, the respondent has not provided us with an adequate reason to overlook the fact that his motion is untimely and number-barred. Accordingly, the respondent's motion is denied.[1]

/s/ NEIL P. MILLER
NEIL P. MILLER
FOR THE BOARD

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[1] However, the respondent's appellate fee waiver request is granted. *See* 8 C.F.R. § 1003.8(a)(3).

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Fishkill, New York

File No. A 34 200 190

LUIS RAMON MORALES-SANTANA, RESPONDENT

Sept. 28, 2000

IN REMOVAL PROCEEDINGS

CHARGE: Immigration and Nationality Act Section 237(a)(2)(A)(ii); Sections 237(a)(2)(C), alien convicted of an aggravated felony and an alien convicted of a violation of the law related to possession of a firearm

APPLICATIONS: Article 3 of the Convention Against Torture

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Ada Guerrero Guillod, Esq.

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondent is a 38-year old male, native and citizen of the Dominican Republic who entered the United States in 1975 as a lawful permanent resident. The respondent was convicted on May 17, 1995, of burglary in the first degree, robbery in the second degree on two counts, four counts of attempted murder and criminal possession of a weapon in the second degree.

The Notice to Appear was issued on March 15, 2000 charging the respondent with removability pursuant to the above captioned provisions of the Immigration and Nationality Act. The respondent appeared pro se and admitted the allegations of fact contained in the Notice to Appear and conceded removability.

In support of its allegations, the Immigration Service provided a copy of the respondent's immigrant visa, conviction record and appellate affirmance. Based on respondent's admissions, the only evidence of record, the alien's removability has been established by evidence which is clear and convincing to the charges set out in the Notice to Appear.

The respondent designated the Dominican Republic as the country of removal and requested political asylum from the Dominican Republic. The respondent is not eligible for political asylum because of his conviction for at-

tempted murder. A sentence in excess of five years incarceration statutorily bars him from political asylum and withholding of removal. He is only eligible for Convention Against Torture relief as there is no bar on that based on crime or sentence.

The respondent filed an application for political asylum which is Exhibit Number 7. He is not eligible for adjustment of status as it requires a waiver which is not available to him as an alien convicted of attempted murder.

The respondent submitted an application for political asylum in which he basically makes three claims for relief. He testified that he was mentioned in an article as someone who is a leader of a gang who terrorizes and tortures Dominican businessmen here in the United States and he testified that because of that article which came out in May 1993, the police would know him and the police and private businessmen would torture him if he went back to the Dominican Republic.

His second ground for fearing return to the Dominican Republic is that he started his own religion and the new religion criticized the basis foundations of Christianity and on that basis everybody would want to torture him.

I had the opportunity to observe the testimony and demeanor of the respondent. I believe that the respondent is severely psychologically disturbed. Without be-

ing a psychiatrist, it's clear that this respondent is not in contact with reality. Nothing in his testimony was credible, although I do believe he's Dominican and I do believe he was convicted as alleged.

The burden of proof is on the respondent to prove that it is more likely than not he would be tortured if he returned to the Dominican Republic. There is no evidence that this would happen. Identifying everyone in the world as a potential torturer identifies no one.

The respondent could not be returned to the Dominican Republic for the next 13 years because of his conviction and his sentence is not before 2013. It's extremely unlikely that anything that this respondent did in 1993 would be remembered in 2013 by anybody in the Dominican Republic, particularly newspaper articles or manifestos as to his political opinion or new religion.

The respondent left the courtroom and refused to continue prior to the issuance of this order and the respondent is deemed to have abandoned his application, but this order is being issued any how in case it's deemed that the respondent does have the right to appeal which the Court believes is not the case.

Therefore, upon consideration of whether the respondent is deemed to be treated in absentia or as being present, the following order will be entered:

ORDER

IT IS ORDERED that the respondent's request for relief under Section 3 of the Convention Against Torture is hereby denied and the respondent shall be removed from the United States to the Dominican Republic on the charges contained in the Notice to Appear.

/s/ MITCHELL A. LEVINSKY
MITCHELL A. LEVINSKY
Immigration Judge

APPENDIX E

1. 8 U.S.C. 1401 (1958) provided:

Nationals and citizens of United States at birth.

(a) The following shall be nationals and citizens of the United States at birth:

(1) a person born in the United States, and subject to the jurisdiction thereof;

(2) a person born in the United States to a member of an Indian, Eskimo, Aleutian, or other aboriginal tribe. *Provided*, That the granting of citizenship under this subsection shall not in any manner impair or otherwise affect the right of such person to tribal or other property;

(3) a person born outside of the United States and its outlying possessions of parents both of whom are citizens of the United States and one of whom has had a residence in the United States or one of its outlying possessions, prior to the birth of such person;

(4) a person born outside of the United States and its outlying possessions of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one

year prior to the birth of such person, and the other of whom is a national, but not a citizen of the United States;

(5) a person born in an outlying possession of the United States of parents one of whom is a citizen of the United States who has been physically present in the United States or one of its outlying possessions for a continuous period of one year at any time prior to the birth of such person;

(6) a person of unknown parentage found in the United States while under the age of twenty-one years, not to have been born in the United States;

(7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided*, That any periods of honorable service in the Armed Forces of the United States by such citizen parent may be included in computing the physical presence requirements of this paragraph.

(b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[1] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

(c) Subsection (b) of this section shall apply to a person born abroad subsequent to May 24, 1934: *Provided, however*, That nothing contained in this subsection shall be construed to alter or affect the citizenship of any person born abroad subsequent to May 24, 1934, who, prior to the effective date of this chapter, has taken up a residence in the United States before attaining the age of sixteen years, and thereafter, whether before or after the effective date of this chapter, complies or shall comply with the residence requirements for retention of citizenship specified in subsections (g) and (h) of section 201 of the Nationality Act of 1940, as amended.

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[1] So in original. Probably should read "United States".

2. 8 U.S.C. 1409 (1958) provided:

Children born out of wedlock.

(a) The provisions of paragraphs (3)-(5) and (7) of section 1401(a) of this title, and of paragraph (2) of section 1408, of this title shall apply as of the date of birth to a child born out of wedlock on or after the effective date of this chapter, if the paternity of such child is established while such child is under the age of twenty-one years by legitimation.

(b) Except as otherwise provided in section 405 of this Act, the provisions of section 1401(a)(7) of this title shall apply to a child born out of wedlock on or after January 13, 1941, and prior to the effective date of this chapter, as of the date of birth, if the paternity of such child is established before or after the effective date of this chapter and while such child is under the age of twenty-one years by legitimation.

(c) Notwithstanding the provision of subsection (a) of this section, a person born, on or after the effective date of this chapter, outside the United States and out of wedlock shall be held to have acquired at birth the nationality status of his mother, if the mother had the nationality of the United States at the time of such

person's birth, and if the mother had previously been physically present in the United States or one of its outlying possessions for a continuous period of one year.